

EXHIBIT A

TO DECLARATION OF SEAN W. JAQUEZ
IN SUPPORT OF ICANN'S OPPOSITION TO
PLAINTIFF'S *EX PARTE* APPLICATION
FOR TEMPORARY RESTRAINING ORDER

**VERISIGN, INC., Plaintiff, v. INTERNET CORPORATION FOR ASSIGNED
NAMES AND NUMBERS, Defendant.**

CASE NO. CV 04-1292 AHM (CTx)

**UNITED STATES DISTRICT COURT FOR THE CENTRAL DISTRICT OF
CALIFORNIA**

2004 U.S. Dist. LEXIS 17330; 2004-2 Trade Cas. (CCH) P74,551

August 26, 2004, Decided

August 26, 2004, Filed

PRIOR HISTORY: [*1] ORDER DISMISSING ANTITRUST CLAIM WITH PREJUDICE AND DECLINING TO EXERCISE SUPPLEMENTAL JURISDICTION OVER REMAINING STATE LAW CLAIMS

DISPOSITION: Defendant's motion to dismiss the antitrust claim with prejudice granted; court declined to exercise supplemental jurisdiction over remaining state law claims. Defendant's renewed motion to strike claims two through six vacated.

LexisNexis(R) Headnotes

COUNSEL: VeriSign Inc, a Delaware Corporation, Plaintiff: Brian A. Davis, VeriSign Inc, Litigation Department, Dulles VA; Laurence J. Hutt, Ronald L. Johnston, Thaddeus Mason Pope, Arnold & Porter, Los Angeles, CA; Richard L. Rosen, Arnold and Porter, Washington, DC.

Internet Corporation for Assigned Names and Numbers, a California Corporation, Defendant: Christina D. Coates, Courtney M. Schaberg, Emma Killick, Jeffery A. LeVee, Sean W. Jaquez, Jones Day, Los Angeles, CA; Joe Sims, Jones Day, Washington, DC.

JUDGES: A. Howard Matz, United States District Judge.

OPINIONBY: A. Howard Matz

OPINION:

INTRODUCTION AND PROCEDURAL HISTORY

On February 26, 2004, VeriSign filed a complaint against Defendant Internet Corporation for Assigned Names and Numbers ("ICANN") alleging causes of action for: (1) violation of *Section 1 of the Sherman Act*, (2) injunctive relief for breach of contract, (3) damages for breach [*2] of contract, (4) interference with contractual relations, (5) specific performance of contract and injunctive relief, (6) damages for breach of contract, and (7) declaratory judgment. Subject matter jurisdiction was premised on federal questions arising under the *Sherman Act* and the *Declaratory Judgment Act*. Compl. P 8.

On May 18, 2004, the Court granted ICANN's motion to dismiss the Complaint. The Court held that VeriSign had failed to sufficiently allege an antitrust conspiracy and an injury of the type the antitrust laws were designed to protect. The Court stated that if VeriSign failed to plead a viable antitrust claim in any First Amended Complaint ("FAC") or chose not to file an FAC, the Court would dismiss the Sherman Act claim with prejudice and decline to exercise supplemental jurisdiction over the state law claims. The Court also vacated ICANN's special motion to strike the state law claims as strategic lawsuits against public participation, pursuant to *Cal. Civ. Proc. Code Section 425.15*, subject to renewal at a later date if VeriSign did file a FAC alleging a viable federal claim.

On June 14, 2004, VeriSign filed a FAC, adding nearly 30 pages [*3] of allegations to its Sherman Act claim, *see PP 85-182*. Now ICANN moves to dismiss claims one through six of the FAC pursuant to *Fed. R. Civ. P. 12(b)(6)*, and also renews its motion to strike the second through sixth claims. The Court GRANTS ICANN's motion to dismiss the antitrust claim, this time with prejudice, and declines to exercise supplemental jurisdiction over the remaining state law claims.

FACTUAL ALLEGATIONS

ICANN is a non-profit corporation that was organized in 1998 "in response to a plan by the [Department of Commerce] to introduce competition into the field of domain name registration, among other objectives." FAC P 17. The Internet is comprised of numerous top level domains ("TLDs"). Some are generic TLDs ("gTLDs") like .com, .net, .gov, and .biz, while others are country code TLDs ("ccTLDs") such as .uk and .ca. n1 *Id.* P 11. Each TLD has a "registry" or operator, a single entity responsible for keeping the records and a directory of all the domain names registered within that TLD. *Id.* P 14. A person seeking to register a domain name within any given TLD must do so through a "registrar" for that TLD. *Id.* [*4] P 15. There are approximately 250 TLDs throughout the world that compete with each other, through their respective registries, to attract registrars and registrants. *Id.* PP 11, 31.

n1 ICANN does not claim to have any power to regulate ccTLDs. *Id.* P 78. Nonetheless, 11 of the approximately 240 ccTLDs have entered into registry agreements with ICANN. *Id.* P 81. "ccTLDs" compete with other TLD registries. *Id.* P 19.

One of ICANN's functions is to enter into registry agreements that authorize an entity to act as the registry for a particular gTLD. *Id.* P 19. The FAC describes how ICANN functions:

ICANN is governed by and acts through an international Board of Directors that is elected by members of various constituent groups and supporting organizations within ICANN. As more specifically alleged below, among the members of these groups are operators of gTLDs that compete with each other and with VeriSign; domain name registrars that are present or potential competitors of each other and of VeriSign [*5] for certain services; and foreign governments and foreign registries that have ccTLDs that compete with the gTLD registries operated by VeriSign. ICANN frequently carries out its activities, including the conduct alleged herein, through the collective action of its supporting organizations (which, in turn, are comprised of various constituent groups). In fact, in certain circumstances, ICANN

was bound by its By-Laws to follow the actions of its supporting organizations.

Id. P 17.

ICANN is an unusual organization. It is not like a typical association, because it has numerous "constituencies" that explicitly acknowledge that they have commercial interests that sometimes are at odds or in conflict with the interests of other constituents. Indeed, one of ICANN's rather formidable challenges is to promote coherent policies that accommodate, or at least take into account, the differing objectives of competing interests in the business of "cyberspace." ICANN is essentially comprised of a Board of Directors and three advisory bodies called "supporting organizations." Each of the supporting organizations has primary responsibility for developing and recommending policy in its area [*6] of expertise. Those areas are: (1) Domain Name Supporting ("DNSO"); (2) Address Supporting ("ASO"); and (3) Protocol Supporting ("PSO"). *Id.* P 91; Def.'s Supplemental Req. for Judicial Notice, Exh. L (Bylaws), Art. VI, § § 1(a),2(b). n2

n2 Over Plaintiff's objection, the Court takes judicial notice of Exhibit L, ICANN's bylaws. The bylaws are a proper subject of judicial notice because VeriSign references them in the FAC (e.g., PP 17, 86, 95, 102) and their authenticity is not disputed. *Branch v. Tunnell*, 14 F.3d 449, 454 (9th Cir. 1994).

In 2001, VeriSign and ICANN entered into a registry agreement authorizing VeriSign to act as the sole registry for the ".com" gTLD. FAC PP 21-22. Under the agreement, VeriSign must provide certain "registry services" to accredited registrars in accordance with ICANN's specifications. *Id.* P 23. The core of this dispute is that ICANN allegedly has taken actions to: (1) prohibit or otherwise restrict VeriSign from offering services valuable to Internet [*7] users, n3 (2) impose improper conditions on the offering of such services by VeriSign, (3) regulate and set the prices at which such services may be offered, and/or (4) delay the introduction of new services. *Id.* P 1. Because ICANN has allegedly blocked, delayed, and restricted the "value-added" services VeriSign has sought to offer its customers, VeriSign is "at a competitive disadvantage" since other TLD registries have been able to introduce similar services without restriction or delay. *Id.* PP 77-78. VeriSign claims that ICANN's various actions have breached their 2001 registry agreement, *id.* PP 188-200, 207-222; interfered with a contract VeriSign had with an unidentified third

party, *id.* PP 201-206; and violated the antitrust laws, *id.* PP 83-187.

n3 In particular, the services to which VeriSign refers are Site Finder (described at PP 32-33 of the FAC), Wait Listing Service PP 39-40), ConsoliDate (PP 47-49), Internationalized Domain Names (PP 55-57), and the Incentive Marketing Program (P65).

[*8]

APPLICABLE LEGAL STANDARD

On a motion to dismiss pursuant to *Rule 12(b)(6)* of the *Federal Rules of Civil Procedure* for failure to state a claim, the allegations of the complaint must be accepted as true and are to be construed in the light most favorable to the nonmoving party. *Wylar Summit P'ship v. Turner Broad. Sys., Inc.*, 135 F.3d 658, 661 (9th Cir. 1998). A *Rule 12(b)(6)* motion tests the legal sufficiency of the claims asserted in the complaint. Thus, if the complaint states a claim under any legal theory, even if the plaintiff erroneously relies on a different legal theory, the complaint should not be dismissed. *Haddock v. Bd. of Dental Examiners*, 777 F.2d 462, 464 (9th Cir. 1985). On the other hand, dismissal is proper where "it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." *Conley v. Gibson*, 355 U.S. 41, 45-46, 2 L. Ed. 2d 80, 78 S. Ct. 99 (1957); *Moore v. City of Costa Mesa*, 886 F.2d 260, 262 (9th Cir. 1989) (employing *Conley v. Gibson* standard). Where a motion to dismiss is granted, a district court should [*9] provide leave to amend unless it is clear that the complaint could not be saved by any amendment. *Chang v. Chen*, 80 F.3d 1293, 1296 (9th Cir. 1996).

"Generally, a district court may not consider any material beyond the pleadings in ruling on a *Rule 12(b)(6)* motion. . . . However, material which is properly submitted as part of the complaint may be considered" on a motion to dismiss. *Hal Roach Studios, Inc. v. Richard Feiner & Co.*, 896 F.2d 1542, 1555 n.19 (9th Cir. 1990) (citations omitted). Similarly, "documents whose contents are alleged in a complaint and whose authenticity no party questions, but which are not physically attached to the pleading, may be considered in ruling on a *Rule 12(b)(6)* motion to dismiss" without converting the motion to dismiss into a motion for summary judgment. *Branch*, 14 F.3d at 454 (9th Cir. 1994) (citing *Romani v. Shearson Lehman Hutton*, 929 F.2d 875, 879 n.3 (1st Cir. 1991)). If the documents are not physically attached to the complaint, they may be considered if their "authenticity . . . is not contested" and "the plaintiff's complaint necessarily relies" on them. *Parrino v. FHP,*

Inc., 146 F.3d 699, 705-06 (9th Cir. 1998). [*10] "The district court will not accept as true pleading allegations that are contradicted by facts that can be judicially noticed or by other allegations or exhibits attached to or incorporated in the pleading." 5C Wright & Miller, *Fed. Prac. and Pro.* § 1363 (3d. ed. 2004).

DISCUSSION

I. First Cause of Action: Antitrust Violation

Verisign's antitrust claim is brought under *Section 1 of the Sherman Act*, which states, in pertinent part, that "every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal." 15 U.S.C. § 1. The elements required to allege a *Section 1* violation are: "(1) an agreement or conspiracy among two or more persons or distinct business entities; (2) by which the persons or entities intend to harm or restrain competition; and (3) which actually injures competition." *Les Shockley Racing, Inc. v. Nat'l Hot Rod Ass'n*, 884 F.2d 504, 507 (9th Cir. 1989). n4 Although *Section 1* claims are not subject to a heightened pleading standard, the plaintiff must plead facts to support each [*11] element of the claim. Von Kalinowski, Sullivan & McGuirl, *Antitrust Law and Trade Regulation* § 164.01 (Matthew Bender 2002). "The pleader may not evade these requirements by merely alleging a bare legal conclusion; if the facts 'do not at least outline or adumbrate' a violation of the Sherman Act, the plaintiffs will get nowhere merely by dressing them up in the language of antitrust." *Rutman Wine Co. v. E. & J. Gallo Winery*, 829 F.2d 729, 736 (9th Cir. 1987).

n4 The parties both treat this case under the "rule of reason" standard rather than the "per se" rule reserved for presumptively illegal practices such as price-fixing, and the Court does the same. See *McGlinchy v. Shell Chem. Co.*, 845 F.2d 802, 811 n.3 (9th Cir. 1988).

Section 4 of the Clayton Act, pursuant to which VeriSign seeks to recover treble damages for the alleged Sherman Act violation, authorizes a private individual to bring suit under the antitrust laws if that individual has been "injured in his business [*12] or property by reason of anything forbidden in the antitrust laws." 15 U.S.C. § 15. The Supreme Court has interpreted this language to mean that "Plaintiffs must prove antitrust injury, which is to say injury of the type the antitrust laws were intended to prevent and that flows from that which makes defendants' acts unlawful. The injury should reflect the anti-competitive effect either of the violation or of anticom-

petitive acts made possible by the violation." *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477, 489, 50 L. Ed. 2d 701, 97 S. Ct. 690 (1977). These requirements are referred to as "antitrust standing." See, e.g., *Pool Water Prods. v. Olin Corp.*, 258 F.3d 1024, 1034 (9th Cir. 2001). There is no antitrust violation "if the injury flows from aspects of the defendant's conduct that are beneficial or neutral to competition . . . An act is deemed *anticompetitive* . . . only when it harms both allocative efficiency and raises the prices of goods above competitive levels or diminishes their quality." *Rebel Oil Co., Inc. v. Atl Richfield Co.*, 51 F.3d 1421, 1433 (9th Cir. 1995), cert. denied, 516 U.S. 987, 133 L. Ed. 2d 424, 116 S. Ct. 515 (1995) [*13] (emphasis in original).

VeriSign alleges that "the conduct of ICANN in restricting and purporting to 'regulate' non-Registry Services offered or proposed to be offered by VeriSign, and in delaying the introduction and setting the prices or terms of those services, represents the collective and conspiratorial acts of ICANN and existing and potential competitors of VeriSign, including competitors who are members of the constituent groups and supporting organizations of ICANN, in the relevant markets and submarkets as defined below." FAC P 84. The specific services to which VeriSign refers in its antitrust claim are the Wait Listing Service ("WLS"), the Site Finder Service ("SFS"), and Internationalized Domain Names ("IDN"). *Id.* P 88. VeriSign alleges that ICANN's conduct "has deprived consumers of a beneficial new service and VeriSign of revenues and profits it would generate . . ." *Id.* P 38; see also PP 46, 54, 64, 67. By making "the registration of domain names within the .com gTLD more desirable and attractive," these new services are alleged to be important to enable "VeriSign to compete more effectively with operators of competitive gTLD and ccTLD registries that are [*14] offering or intend to offer a similar service." *Id.* P 67; see also P 31. While VeriSign has been blocked, delayed, or restricted from offering these new services, other gTLD registries regulated by ICANN "have been allowed to offer and market similar, competitive services . . ." *Id.* P 77; see also PP 34, 44, 64, 67. In particular, VeriSign alleges that ICANN has facilitated ".museum," one of its gTLD competitors, in offering a service similar to VeriSign's Site Finder. *Id.* P 34. In addition, most ccTLD registries, which constitute some 240 out of 250 of all TLDs, are not regulated by ICANN and "are free to offer, and are offering, new and improved services to registrars and registrants. . ." *Id.* PP 11, 19, 78.

A. Conspiracy Allegations

ICANN argues that VeriSign has not properly pled a conspiracy because it has not alleged that its competitors controlled the relevant ICANN decision-makers: the Board of Directors and ICANN's President.

VeriSign recognizes that in order to sufficiently plead a conspiracy, it must allege that ICANN's decision-making process was controlled by economic competitors who have conspired to injure VeriSign. But what VeriSign [*15] alleges is different: that certain named competitors have conspired to control *advisory groups* that report to ICANN's ultimate decision-maker, the Board of Directors. Paragraph 85 of the FAC alleges that "the constituent groups and supporting organizations of ICANN . . . are substantially controlled by existing and potential competitors of VeriSign . . ." See, e.g., *id.* PP 92-102 (Domain Name Supporting Organization ("DNSO") controlled by competitors and issued policy paper and report to Board regarding WLS), PP 130-135 (Security and Stability Advisory Committee ("SECSAC") controlled by competitors and issued recommendation to Board regarding regulation of SFS); PP 158-161 (Registry Implementation Committee ("RIC") controlled by competitors and proposed guidelines to Board for IDN).

Moreover, the FAC acknowledges that the final decision to regulate each of the VeriSign services at issue was made by either the Board or the President, not the advisory bodies. See, e.g., *id.* PP 98, 102 (Board adopted DNSO proposals to regulate WLS); P 138 (Board "never adopted a lawful resolution regulating Site Finder"); n5 P 163 (Board adopted IDN guidelines proposed by RIC).

n5 ICANN's President, rather than the Board, sent VeriSign a letter requiring it to close its Site Finder Service ("SFS"). FAC P 36. The Court takes judicial notice of this October 3, 2003 letter, which VeriSign refers to as the "Suspension Ultimatum." Def.'s Req. for Judicial Notice, Ex. F. The letter is a proper subject of judicial notice because it is referenced in the FAC and its authenticity is not disputed. *Branch, supra*. Since the Board never took action regarding SFS, the allegation that one of the SFS "co-conspirators" held a seat on the Board is irrelevant. *Id.* P 138.

[*16]

VeriSign's theory seems to be that the advisory bodies were the *de facto* decision-makers because the Board essentially rubber-stamped all of their recommendations. VeriSign alleges that Board approval was a foregone conclusion because of:

. ICANN's unique bottom-up policy development process by constituency groups of competitors (P 86); . . .

. . . the requirement of ICANN's Bylaws that the constituency groups' policy decisions be followed by the Board of Directors of ICANN (PP 86, 95, 102);

. . . ICANN's dependence on Verisign's competitors for its funding (P 93). . .

. . . [and] specific admissions by ICANN's President that the policy development process at ICANN was subject to capture for precisely the reasons stated above and that competitors working through ICANN used its processes to "hamstring their competitors." (PP 86, 90, 95).

Pl.'s Opp'n, 2:7-19.

Verisign's contentions are deficient. First, there is nothing inherently conspiratorial about a "bottom-up" policy development process that considers or even solicits input from advisory groups. *See Hahn v. Or. Physicians' Serv.*, 868 F.2d 1022, 1029 (9th Cir. 1989) (*en* [*17] *banc*); *Barry v. Blue Cross of Cal.*, 805 F.2d 866, 868-69 (9th Cir. 1986) (advisory committee's comments and suggestions did not establish requisite control over Board's decisions). "Participation" is not enough to give rise to antitrust liability; *control* is required.

Second, the Bylaws in effect at the time of these events, which the Court judicially notices, do *not* require the Board to accept the advisory bodies' policy recommendations. Rather, the Bylaws provide that:

the Board [of Directors] shall accept the recommendations of a Supporting Organization if the Board finds that the recommended policy (1) furthers the purposes of, and is in the best interest of, the Corporation; (2) is consistent with the Articles and Bylaws; (3) was arrived at through fair and open processes (including participation by representatives of other Supporting Organizations if requested); and (4) is not reasonably opposed by any other Supporting Organization. *No recommendation of a Supporting Organization shall be adopted unless the votes in favor of adoption would be sufficient for adoption by the Board without taking account of either the Directors selected by the* [*18] *Supporting Organization or their votes.* n6

n6 According to these Bylaws, each of the three Supporting Organizations selects three Directors. Exh. L, Art. 5, § 4.

Exh. L, Art. VI, § 2(e) (emphasis added). If the Board rejects a policy recommendation, Section 2(f) provides the procedure for returning it to the Supporting Organization for further consideration. If after reconsideration the Supporting Organization still does not provide an acceptable recommendation, "the Board may initiate, amend or modify and then approve a specific policy recommendation" if prompt action is necessary. *Id.* § 2(f). Article VI, Section 2 of the bylaws does not "require" the Board to approve the proposals and "the district court will not accept as true pleading allegations that are contradicted by facts that can be judicially noticed . . ." 5C Wright & Miller, *Fed. Prac. and Pro.* § 1363 (3d. ed. 2004).

Third, VeriSign alleges in Paragraph 93 that ICANN "has been seriously underfunded," that members of the [*19] Registrar Constituency "have provided the single largest source of ICANN's funding," and that "one or more of the WLS co-conspirators have offered to fund expenses of ICANN in defense of the claims made in this litigation." VeriSign alleges that the "WLS co-conspirators" are part of the Registrar Constituency, which provides the majority of ICANN funding. FAC P 93. There are approximately 175 registrars in the United States, *id.* P 15, yet only six are alleged to be "WLS co-conspirators." *Id.* P 90. Nowhere does VeriSign allege that these six conspirators provide the majority of ICANN's funding. Nor has VeriSign alleged that ICANN accepted the alleged offer to defray the cost of this litigation.

Fourth, VeriSign makes too much of the fact that the President of ICANN stated in his February 2002 report that ICANN's consensus decision-making process was "too exposed to capture by special interests" and that the supporting organizations pushed ICANN "to perform only those policy functions that hamstring their competitors." *Id.* P 86; *see also* P 95. That statement did not refer to any of the particular competitors or registry services at issue in this lawsuit. In addition, [*20] it was made several months before VeriSign was prepared to offer WLS, in August 2002 (*id.* P 44), well before VeriSign received the Suspension Ultimatum regarding SFS, in October 2003 (*id.* P 36), and before the Board., enacted IDN regulations harming VeriSign, in June 2003 (*id.* P 164). However applicable the President's concerns

still may have been at those later times, what is most deficient about these allegations is that the President's statements were about lower-level processes. *Nowhere does the FAC allege that he admitted that the Board itself had been captured.* Moreover, there is no allegation (much less factual support for one) that the Board of ICANN actually conspired with any of VeriSign's competitors. VeriSign does not allege any specific facts to support its theory that the Board complied with the conspirators' alleged attempt to "hamstring" VeriSign -- no allegations regarding how much time the Board spent deliberating, how many meetings the Board held or how many objections or comments the Board considered. That the Board ultimately may have adopted an advisory group's policy recommendation, or that it was common practice for the Board to do so, does not [*21] mean that the Board merely "rubber stamped" the proposals and allowed itself to be controlled by Verisign's competitors. *See County of Tuolumne v. Sonora Cmty. Hosp.*, 236 F.3d 1148, 1156-57 (9th Cir. 2001) ("As the Eleventh Circuit has noted, simply because the 'board is likely to follow the recommendations of the medical staff does not establish, or even reasonably suggest, the existence of a conspiracy.' . . . Even though the Board has never disagreed with [the competitors'] recommendation . . . the Board did not merely 'rubber stamp' [the competitor's] recommendation.") (citation deleted; emphasis added).

In an attempt to overcome the foregoing defects in the FAC's factual allegations, VeriSign cites language from several cases that are either distinguishable or inapposite. The case VeriSign relies on most is *Am. Soc'y of Mech. Eng'rs v. Hydrolevel Corp.*, 456 U.S. 556, 72 L. Ed. 2d 330, 102 S. Ct. 1935 (1982). There, plaintiff was one of more than 90,000 members of defendant, a non-profit membership corporation that promulgated codes for engineering and manufacturing standards. Defendant sent a letter to a competitor of plaintiff. The letter was on the association's [*22] stationery and was signed by one of its employees. It basically declared plaintiff's product to be unsafe. The competitor then used the letter to dissuade third parties from buying plaintiff's product. The association's subcommittee that approved the letter had as its vice-chairman someone who just happened to be the vice-president of the competitor; indeed, that person orchestrated the preparation and mailing of the letter by the association. Plaintiff's *Sherman Act Section 1* case against the association-defendant went to trial. Plaintiff requested that the jury be instructed that defendant could be liable for its agents' conduct if they acted within the scope of their apparent authority. The court rejected plaintiff's request. Nevertheless, the jury returned a verdict for plaintiff and on appeal, the Supreme Court held that plaintiff's proffered instruction was sound.

VeriSign cites *Hydrolevel* for the propositions that "an organization could be liable for conspiring with plaintiff's competitor, notwithstanding that the organization itself did not compete with plaintiff and that "it did not matter that the decision-maker was not the Board of the association . . ." Pl's Opp'n, [*23] 13:10-25. *Hydrolevel* is really about the appropriate instruction for the derivative liability of an employer for antitrust violations committed by its employees. Moreover, *Hydrolevel* is distinguishable on its facts. First, unlike what is alleged here, the defendant-association's subcommittee was clearly "captured" by the plaintiff's competitor whose vice-president manipulated the association into approving and circulating the terribly injurious attack on plaintiff's product. Second, it is not correct that *Hydrolevel* holds that Board action is irrelevant. Indeed, if the association had not expressly delegated final decision-making authority to the subcommittee, the letter would not have been issued. In short, the association's conduct was a *sine qua non* to the case and the Supreme Court's opinion. Third, *Hydrolevel* went to trial; standards for pleading a conspiracy claim were not at issue.

In *Hahn, supra*, the district court granted summary judgment to defendant, an association of physicians. The issue on appeal was whether those members of the association's board who were physicians and who did not compete directly with the podiatrist-plaintiffs [*24] nevertheless "shared similar economic interests with [other] board members and . . . physicians who did compete directly," so as to permit the trier of fact to conclude that the "board as a whole may have acted in the anticompetitive interests of . . . [the] member physicians. . . ." *Hahn*, 868 F.2d at 1030. To answer that question the Ninth Circuit articulated this test: "The proper inquiry is whether [decision-makers] sharing substantially similar economic interests collectively exercised control of [the organization] under whose auspices they have reached agreements which work to the detriment of competitors." *Id.* at 1029. The court found that plaintiff had adduced enough such evidence. I apply the *Hahn* test here, yet reach the opposite conclusion, because *Hahn* is factually distinguishable in a critical respect. In *Hahn*, the plaintiff adduced evidence which established that physicians, many of whom competed with podiatrists, "formed a majority of the [defendant's] board." *Id.* at 1029. There is no such allegation here. *See Podiatrist Ass'n v. La Cruz Azul De Puerto Rico, Inc.*, 332 F.3d 6, 14 (1st Cir. 2003) [*25] (upholding summary judgment for defendant in a *Sherman Act Section 1* case where plaintiffs could not establish that their competitors controlled the defendant's board and noting "The corporate bylaws make manifest that board action requires a majority vote and the . . . [competitors, who held eight out of nineteen seats on the board] simply do not constitute a majority.")

Finally, in *Allied Tube & Conduit Corp. v. Indian Head, Inc.*, 486 U.S. 492, 100 L. Ed. 2d 497, 108 S. Ct. 1931 (1988), the trade association involved in the underlying facts was not a party and the opinion does not even deal with the elements of a *Sherman Act Section 1* claim; the issue and the holding concern the scope of the *Noerr* doctrine. *Allied Tube* has no bearing here.

To summarize, VeriSign has not alleged, and cannot allege, that the co-conspirators comprised a majority of the ICANN Board of Directors. It has not alleged and, given that the bylaws provide otherwise, it cannot allege that the "supporting organizations" within ICANN's structure that do include competitors of VeriSign dominated the Board. *See Barry, supra*. Nor has VeriSign pled with requisite specificity facts that, even circumstantially, [*26] establish that ICANN's Board was a "rubber stamp." *County of Tuolumne, supra*. For all these reasons, VeriSign has not sufficiently alleged a *Section 1* conspiracy.

B. Antitrust Standing

Given the foregoing conclusion, which requires dismissal of the antitrust claim, I need not analyze whether VeriSign has pled facts establishing "antitrust injury" and standing, and I choose not to.

II. Second Through Seventh Causes of Action; Breach of Contract, Interference With Contractual Relations, and Declaratory Judgment

Because the Court dismisses Plaintiff's antitrust claim, the only cause of action arising under federal law, the Court declines to exercise supplemental jurisdiction over the remaining state law claims. 28 U.S.C. § 1367(c)(3). Thus, the breach of contract causes of action (claims 2, 3, 5, and 6), the interference with contractual relations cause of action (claim 4), and the request for a declaratory judgment (claim 7) n7 are DISMISSED without prejudice to being filed in state court. Judicial resources will not be wasted as the case is in its early stages and the Court has not had occasion to address any [*27] of the state law claims. Plaintiff will not be prejudiced since the statute of limitations is tolled during the time the state law claims were pending in federal court and for an additional period of at least 30 days. 28 U.S.C. § 1367(d); Schwarzer, Tashima & Wagstaffe, *Cal. Prac. Guide: Fed. Civ. Pro. Before Trial* § 2:161 (The Rutter Group 2004).

n7 VeriSign also asserts that the Court has subject matter jurisdiction pursuant to 28 U.S.C. § 2201 (the Declaratory Judgment Act). FAC P 7. The Declaratory Judgment Act "merely creates a remedy in cases otherwise within federal jurisdiction," and "is not an independent basis of federal question jurisdiction." *See* Schwarzer, Tashima & Wagstaffe, *Cal. Prac. Guide: Fed. Civ. Pro. Before Trial* § 2:132 (The Rutter Group 2004); *Franchise Tax Bd. v. Constr. Laborers Vacation Trust*, 463 U.S. 1, 27-28, 77 L. Ed. 2d 420, 103 S. Ct. 2841 (1983). The test is whether the underlying claim that the defendant has threatened to pursue in litigation and that plaintiff seeks to avoid through a declaratory judgment arises under federal law. *Id.* Here, it does not. VeriSign merely seeks the Court's interpretation of certain key provisions of the parties' 2001 registry agreement, presumably to avoid a breach of contract claim from ICANN.

[*28]

CONCLUSION

For the foregoing reasons, the Court hereby GRANTS Defendant's motion to dismiss claim one of the FAC, with prejudice. n8 The Court declines to exercise supplemental jurisdiction and DISMISSES the second through seventh claims, without prejudice to their being filed in state court. The Court VACATES Defendant's renewed motion to strike claims two through six. n9

n8 Docket No. 70.

n9 Docket No. 69.

In light of this ruling, the Court need not rule on the parties' various remaining requests for judicial notice and related disputes.

Within seven calendar days of this Order, Defendant shall serve and lodge a proposed judgment.

IT IS SO ORDERED.

DATE: August 26 2004

A. Howard Matz

United States District Judge

EXHIBIT B

TO DECLARATION OF SEAN W. JAQUEZ
IN SUPPORT OF ICANN'S OPPOSITION TO
PLAINTIFF'S *EX PARTE* APPLICATION
FOR TEMPORARY RESTRAINING ORDER

**DOTSTER, INC., etc., et al. -v- INTERNET CORPORATION FOR ASSIGNED
NAMES AND NUMBERS, etc.**

Case No. CV 03-5045-JFW (MANx)

**UNITED STATES DISTRICT COURT FOR THE CENTRAL DISTRICT OF
CALIFORNIA**

296 F. Supp. 2d 1159; 2003 U.S. Dist. LEXIS 22634

November 10, 2003, Filed

DISPOSITION: Plaintiffs' Motion for Preliminary Injunction denied.

LexisNexis(R) Headnotes

COUNSEL: **[**1]** For DOTSTER INC, a Washington corporation, plaintiff: Kathleen O Peterson, Aaron M McKown, Preston Gates & Ellis, Irvine, CA. Stuart M Brown, Jeffrey W Ring, Preston Gates & Ellis, Portland, OR.

For GO DADDY SOFTWARE INC, an Arizona corporation, plaintiff: Kathleen O Peterson, Aaron M McKown, Preston Gates & Ellis, Irvine, CA. Stuart Brown, Preston Gates & Ellis, Portland, OR.

For ENOM INC, a Washington corporation, plaintiff: Benjamin E Soffer, Perkins Cole, Santa Monica, CA. Kathleen O Peterson, Aaron M McKown, Preston Gates & Ellis, Irvine, CA. Stuart Brown, Preston Gates & Ellis, Portland, OR.

For INTERNET CORPORATION FOR ASSIGNED NAMES & NUMBERS, a California corporation, defendant: Jeffrey A Levee, Emma Killick, Eric P Enson, Jones Day, Los Angeles, CA.

JUDGES: HONORABLE JOHN F. WALTER,
UNITED STATES DISTRICT JUDGE.

OPINIONBY: JOHN F. WALTER

OPINION:

**[*1160] ORDER DENYING PLAINTIFFS'
MOTION FOR PRELIMINARY INJUNCTION**

On September 8, 2003, Plaintiffs Dotster, Inc., Go Daddy Software, Inc., and eNom, Incorporated (collec-

tively, "Plaintiffs") filed a Motion for Preliminary Injunction. On September 15, 2003, Defendant Internet Corporation for Assigned Names and Numbers ("ICANN" or "Defendant") **[**2]** filed its Opposition. On September 22, 2003, Plaintiffs filed a Reply. The Motion came regularly for hearing on October 20, 2003. After hearing oral argument on the Motion, the Court took the matter under submission. After reviewing the moving, opposing, and reply papers and hearing oral argument, the Court rules as follows:

I. Facts and Procedural History

ICANN is a not-for-profit corporation organized in 1998. Pursuant to a series of agreements with the United States Department of Commerce, ICANN is responsible for administering certain aspects of the Internet's domain name system. As part of its responsibilities, ICANN accredits companies known as "registrars" that make Internet domain names available to consumers. Each registrar enters into an identical Registrar Accreditation Agreement ("RAA") with ICANN which permits the registrar the right to use domain names in a particular domain, such as ".com" or ".net." Registrars, in turn, accept requests for domain names from their customers and register those domain names with the appropriate Internet registry.

ICANN also enters into separate Registry Agreements with Internet registries. Each top level domain name -- such as **[**3]** .com, .net, or .org -- is operated by a single registry. A registry maintains information on each name registered in its domain and insures that each name registered in its domain is unique. Registries offer a variety of services that, for example, permit consumers to check if a particular name within its domain has been registered and, if so, the expiration date for this registration. Verisign, Inc. ("Verisign") is the registry for .com and .net domains and it is responsible for registering names on these domains in accordance with its Registry

Agreement with ICANN. Because Verisign is prohibited from accepting requests for domain names directly from consumers, Verisign only accepts and registers domain names received from registrars.

Plaintiffs are three of over 170 registrars, who have entered into identical RAAs with ICANN Halloran Decl., P 15 & Ex. 2. In exchange for a fee negotiated with their customers, Plaintiffs register [*1161] domain names, and all registrant contact information, with the appropriate registry. Plaintiffs also offer a variety of other services, such as web hosting, web page design, e-mail, and internet utilities. Each domain name registration lasts one or two years [**4] and consumers are given the option to renew their registration at the end of that term. At present, all domain names that are not renewed, and, therefore, have expired, are first deleted and then become available for a new registration. Currently, there are approximately fifty registrars, including Plaintiffs, who compete in the secondary domain name market which focuses on the registration of deleted domain names. Each of these registrars, including Plaintiffs, have developed their own technology which attempts to identify and register a particular domain name for their customers as soon as it is deleted from the registry. The wait-listing products offered by Plaintiffs permit customers, who want to register a particular domain name that is already registered to someone else, to sign up and pay a fee to the Plaintiffs for the chance to obtain that domain name if it is deleted in the future. Plaintiffs cannot guarantee that they will be able to register a deleted domain name for their customers because several registrars may have sold the chance to obtain the very same deleted domain name to different customers and only one of those registrars will be able to successfully register [**5] that name for their customer.

In late 2001, Verisign proposed a new product called Wait List Service ("WLS") which will compete with the wait-listing products offered by Plaintiffs. If customers choose to participate in WLS, a person wishing to register a currently-registered domain name would purchase a subscription for the opportunity to register that domain name in the event the existing domain registration expires within the subscription period. There will be only one subscription accepted for each currently-registered domain name. Each subscription would last for one year with the option to renew. If a domain name is not renewed by its current owner, the individual who purchased a subscription will become the new registrant of the domain name. WLS will only be offered to consumers through registrars, such as Plaintiffs, and Verisign will charge the registrar a fee, which would be no higher than \$ 24 for a one-year subscription, for each domain name. All registrars would have the option to participate in WLS at the same price and there will be no restrictions

on the price that the registrars can charge their customers.

Contrary to the current system, domain names that are subject [**6] to a WLS subscription would never be deleted from the registry when the original registration expired. If a registered domain name is not renewed, and is to be deleted from the registry, Verisign would check to see whether a subscription exists for the name and, if so, would automatically register the name to the customer. Because Plaintiffs current technology is predicated on the actual deletion of the domain name from the registry, Plaintiffs allege that WLS will deprive them of the opportunity to register a deleted name. The proposed WLS will only impact a portion of Plaintiffs' secondary domain name business because names that were not subject to a WLS subscription and those in TLDs other than .com and .net would continue to be deleted from the registries and would be available for registration by the Plaintiffs. In addition, the proposed WLS will have no affect on how new domain names are initially registered by the Plaintiffs.

Plaintiffs filed their Complaint on July 16, 2003, alleging claims for breach of contract and declaratory relief. Plaintiffs allege that ICANN will be in breach of various provisions of their RAA if it approves an amendment to the registry [*1162] agreement between [**7] ICANN and Verisign allowing the implementation of WLS. Although Plaintiffs are not parties to the Registry Agreement between ICANN and Verisign, Plaintiffs are seeking a preliminary injunction to prevent ICANN from taking any further steps to facilitate or encourage implementation of WLS by Verisign, including, but not limited to, further steps to negotiate or execute an amendment to the Registry Agreement between ICANN and Verisign which governs the registration of domain names for .com and .net domains.

II. Legal Standard

"A preliminary injunction is appropriate where plaintiffs demonstrate 'either: (1) a likelihood of success on the merits and the possibility of irreparable injury; or (2) that serious questions going to the merits were raised and the balance of hardships tips sharply in [their] favor.'" *Southwest Voter Registration Education Project v. Shelley*, 344 F.3d 914, 917 (9th Cir. 2003) (citing *Clear Channel Outdoor Inc. v. City of Los Angeles*, 340 F.3d 810, 813 (9th Cir. 2003) (quoting *Walczak v. EPL Prolong, Inc.*, 198 F.3d 725, 731 (9th Cir. 1999))). "The district court must also consider whether the public [**8] interest favors issuance of the injunction." *Id.* (citing *Fund for Animals, Inc. v. Lujan*, 962 F.2d 1391, 1400 (9th Cir. 1992)). These are not separate tests, but the opposite ends of a single continuum. *Rodeo Collection, Ltd. v. West Seventh*, 812 F.2d 1215, 1217 (9th Cir.

1987) (citing *San Diego Committee Against Registration and the Draft v. Governing Board of Grossmont Union High School Dist.*, 790 F.2d 1471, 1473 n.3 (9th Cir. 1986)). "Under any formulation of the test, the moving party must demonstrate a significant threat of irreparable injury." *Arcamuzi v. Continental Air Lines, Inc.*, 819 F.2d 935 (9th Cir. 1987) (citing *Oakland Tribune, Inc. v. Chronicle Publishing Co.*, 762 F.2d 1374, 1376 (9th Cir. 1985)).

"A preliminary injunction is an extraordinary and drastic remedy, one that should not be granted unless the movant, by a clear showing, carries the burden of persuasion." *Mazurek v. Armstrong*, 520 U.S. 968, 972, 138 L. Ed. 2d 162, 117 S. Ct. 1865 (1997) (quoting 11A C. Wright, A. Miller, & M. Kane, *Federal Practice & Procedure*, § 2948, pp. 129-30 (2d ed. 1995)) (emphasis in *Mazurek*). However, [**9] a preliminary "injunction is not a preliminary adjudication on the ultimate merits." *Sierra On-Line, Inc. v. Phoenix Software, Inc.*, 739 F.2d 1415, 1423 (9th Cir. 1984). "The findings of fact and conclusions of law made by a court granting a preliminary injunction are not binding at trial on the merits." *University of Texas v. Camenisch*, 451 U.S. 390, 395, 68 L. Ed. 2d 175, 101 S. Ct. 1830 (1981); see also *Sierra On-Line*, 739 F.2d at 1423 (for preliminary relief, the court need only find a probability that necessary facts will be established, not that such facts actually exist).

III. Discussion

A. Plaintiffs Have Failed To Demonstrate Irreparable Injury Or That The Balance Of Hardships Tips Sharply In Their Favor.

Plaintiffs have failed to demonstrate either the possibility of irreparable injury or that the balance of hardships tips sharply in their favor. "Regardless of how the test for a preliminary injunction is phrased, the moving party must demonstrate irreparable harm." *American Passage Media Corporation v. Cass Communications, Inc.*, 750 F.2d 1470, 1473 (9th Cir. 1985). Irreparable injury is an injury that is not remote or speculative, [**10] but actual and imminent and for which monetary damages cannot adequately compensate. *Jayaraj v. Scappini*, 66 F.3d 36, 39 (2d Cir. 1995). "Speculative injury does not constitute irreparable [*1163] injury sufficient to warrant granting a preliminary injunction." *Caribbean Marine Services Company, Inc. v. Baldrige*, 844 F.2d 668, 674 (9th Cir. 1988) (citing *Goldie's Bookstore, Inc. v. Sup. Ct.*, 739 F.2d 466, 472 (9th Cir. 1984)).

1. Plaintiffs Have Failed To Demonstrate Irreparable Injury.

The Court finds that Plaintiffs have not demonstrated irreparable injury. Plaintiffs' alleged damages are speculative and any damage incurred can be compen-

sated by money damages. Plaintiffs essentially contend they will be damaged financially because "customers will be more likely to use the proposed WLS than" Plaintiffs' wait-listing services to reserve domain names in the secondary domain name market. Declaration of Thomas Bennett ("Bennett Decl."), P 26; see, also, Second Declaration of Clint Page ("Page Decl."), P 3; Declaration of Paul Stahura ("Stahura Decl."), P 12; and Declaration of Robert Parsons ("Parsons Decl."), P 8. Plaintiffs [**11] also contend they will have to increase their customer service staffs to differentiate themselves from other registrars and to answer an increased number of customer questions about WLS. See, e.g., Parsons Decl., P 9; and Bennett Decl., P 29. Because a monetary award can compensate Plaintiffs for this potential loss of revenue, these injuries do not constitute irreparable injury. n1 *Los Angeles Memorial Coliseum Commission v. National Football League*, 634 F.2d 1197, 1202 (9th Cir. 1980) (quoting *Sampson v. Murray*, 415 U.S. 61, 90, 39 L. Ed. 2d 166, 94 S. Ct. 937 (1974) ("Mere injuries, however substantial, in terms of money, time and energy necessarily expended ... are not enough. The possibility that adequate compensatory or other corrective relief will be available at a later date, in the ordinary course of litigation, weighs heavily against a claim of irreparable harm.)); *Cotter v. Desert Palace, Inc.*, 880 F.2d 1142, 1145 (9th Cir. 1989) (injuries compensable by money damages are not usually deemed irreparable). In addition, Plaintiffs' argument that their damages are capped at the amount of accreditation fees paid by the Plaintiffs to ICANN pursuant to Subsection [**12] 5.7 of the RAA does not change the result. If Plaintiffs entered a disadvantageous contract, they must suffer the consequences. *Caplan v. Fellheimer Eichen Braverman & Kaskey*, 68 F.3d 828, 839 (3rd Cir. 1995) (citing 11A Wright, Miller & Kane, *Federal Practice & Procedure*, § 2947 (2d Ed. 1995)) ("If the harm complained of is self-inflicted, it does not qualify as irreparable."); *Ventura County Christian High School v. City of San Buenaventura*, 233 F. Supp. 2d 1241, 1253 (C.D. Cal. 2002) (citing *Caplan*, 68 F.3d at 839).

n1 Moreover, Plaintiffs' potential loss of revenue is speculative. Plaintiffs claim that a significant part of their business results from cross-sales of products to customers and if Plaintiffs cannot attract new customers through the secondary domain name market, those cross-selling opportunities will disappear. See, e.g., Stahura Decl., P 13. However, Plaintiffs ignore the fact that all registrars will be able to offer WLS to existing and potential customers. If Plaintiffs decide to offer WLS and continue to offer their wait-listing services for domain names not af-

fectured by WLS, Plaintiffs will be able to exploit these cross-selling opportunities.

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Plaintiffs also argue that they will suffer irreparable injury as a result of damage to their goodwill and reputation. However, Plaintiffs present no specific or admissible evidence as to dilution of goodwill or harm to reputation. n2 Although the loss of goodwill [*1164] and reputation are important considerations in determining the existence of irreparable injury, there must be credible and admissible evidence that such damage threatens Plaintiffs' businesses with termination. n3 *American Passage Media Corporation v. Cass Communications, Inc.*, 750 F.2d 1470, 1473 (9th Cir. 1985) ("Without a sufficient showing that these contracts threatened [plaintiffs] existence, any loss in revenue due to an antitrust violation is compensable in damages); *Metromedia Broadcasting Corporation v. MGM/UA Entertainment Co., Inc.*, 611 F. Supp. 415, 426 (C.D. Cal. 1985) (no irreparable injury where existence not threatened). In this case, there is no evidence indicating that Plaintiffs' businesses will not survive the implementation of WLS or that they will not be able to continue to offer their wait-listing services in the secondary domain name market.

n2 Plaintiffs offer the inadmissible conclusions of their own executives that if WLS is implemented, Plaintiffs' goodwill and reputation will be damaged due to an anticipated decrease in sales. See, Parsons Decl., PP 6-9 (loss of revenue due to implementation of WLS will cause drop in customer service, which will harm Go Daddy's reputation); Page Decl., PP 3-6 (Dotster's reputation will be harmed by loss of success of NameWinner technology); Stahura Decl., PP 12-14 (Plaintiff eNom is a "significant competitor" in the secondary domain market and this reputation will be harmed by the implementation of WLS because WLS will cause eNom to have fewer sales with its wait-listing service, Club Drop); and Bennett Decl., PP 27-30 (Dotster's reputation will be harmed by the loss of success of NameWinner technology). Such conclusory statements cannot support a finding of irreparable injury for the issuance of a preliminary injunction. *American Passage Media Corporation*, 750 F.2d at 1473 (9th Cir. 1985) (declarations of plaintiffs executives detailing the disruptive effect of defendant's exclusive contracts on plaintiffs business could not support the issuance of a preliminary injunction because they were "conclusory and without sufficient support in facts."); *Goldie's Bookstore, Inc. v. Sup. Ct.*, 739 F.2d

466, 472 (9th Cir. 1984) (reversing issuance of preliminary injunction where district court had determined that plaintiff "would lose goodwill and 'untold' customers" because the finding was not based on any factual allegations and was speculative).

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n3 Although Plaintiffs' losses, if any, may be reflected in the secondary domain name area of their business, Plaintiffs have not presented any evidence that quantifies or compares those potential losses with other areas of their business. In this regard, Plaintiffs do not even argue that those potential losses would be of such a magnitude that their entire business is threatened with potential ruin. Plaintiffs' failure to present such evidence probably is due to the fact that the wait-listing services represent a relatively new part of their business. For example, Plaintiff Go Daddy Software, Inc. was founded in 1997, but did not start offering its wait-listing service, DomainAlert, until April 2003. Parsons Decl., PP 3 & 5. There is no evidence that all, or even a significant portion of, Go Daddy Software, Inc.'s goodwill and reputation are based on a service it has only been offering for seven months. *New Pacific Overseas Group (USA) Inc. v. Excal International Development Corp.*, 1999 U.S. Dist. LEXIS 6386, 1999 WL 285493, *6 (S.D.N.Y. 1999) (citing *Jack Kahn Music Co. v. Baldwin Piano & Organ Co.*, 604 F.2d 755, 763 (2nd Cir. 1979)) (no finding of irreparable injury "where a company has not been in business long enough for good will to be created.").

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2. Plaintiffs Have Failed To Show The Balance Of Hardships Tips Sharply In Their Favor.

The Court finds Plaintiffs have failed to demonstrate that the balance of hardships tips sharply in their favor. The record is devoid of any evidence that the Plaintiffs will suffer irreparable injury if the injunction is denied. By contrast, the issuance of an injunction would seriously jeopardize ICANN's ability to effectively coordinate the technical and related policy issues for the domain name system as mandated by ICANN's agreements with the Department of Commerce.

B. Plaintiffs Have Not Demonstrated Either A Likelihood of Success On, Or Serious Questions Going To, The Merits.

Plaintiffs have failed to demonstrate either a likelihood of success on, or [*1165] serious questions going to, the merits of their claims. *Johnson v. California State Bd. of Accountancy*, 72 F.3d 1427, 1430 (9th Cir. 1995) (quoting *Martin v. Int'l Olympic Comm.*, 740 F.2d 670, 675 (9th Cir. 1984))(the "irreducible minimum" required under any formulation of the preliminary injunction standard is a "fair chance of success on the merits."). Plaintiffs allege that ICANN will be in breach of [**16] various provisions of the RAA if it approves an amendment to the Registry Agreement between ICANN and Verisign, permitting the implementation of WLS without complying with the Consensus Policies requirement of Subsection 4.1 of the RAA.

Subsection 4.1 of the RAA, the only section of the RAA that sets forth any consensus policy requirement, states:

4.1 Registrar's Ongoing Obligation to Comply with New or Revised Specifications and Policies. During the Term of this Agreement, Registrar *shall comply with* the terms of this Agreement on the schedule set forth in Subsection 4.4, with:

4.1.1 new or revised specifications (including forms of agreement to which Registrar is a party) and policies established by ICANN as Consensus Policies in the manner described in Subsection 4.3,... (emphasis added).

The Court finds that Subsection 4.1 only applies in situations where ICANN seeks to compel registrar action without amending the RAA. There is nothing in this provision that imposes any obligation upon ICANN to act only by consensus where its actions do not seek to compel registrar action. Registrars may elect to offer WLS to their customers but they will be [**17] under no obligation to do so. Because implementation of WLS will not impose any obligation on the registrars or in any manner amend their RAAs with ICANN, it is unlikely that Plaintiffs will be able to prove that the consensus policy provision of Subsection 4.1 of the RAA is applicable and, therefore, that ICANN breached the RAA by not following that provision.

Because Subsection 4.1 is the only section of the RAA that sets forth a Consensus Policy requirement, the Court rejects Plaintiffs' argument that Subsection 4.2 n4 imposes an independent obligation on ICANN to develop

a consensus policy anytime the allocation of domain names is affected. The Court finds that the plain language of Subsection 4.2 merely enumerates or describes a variety of topics for which ICANN *may* compel registrar action through the adoption of new or revised specifications and policies. However, there is nothing in this provision that creates an independent obligation or requires the implementation of a consensus policy any time domain allocation is affected. n5

n4 4.2 Topics for New and Revised Specifications and Policies. New and revised specifications and policies may be established on the following topics: ...

4.2.4. principles for allocation of Registered Names (e.g., first-come/first-served, timely renewal, holding period after expiration).

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n5 The Court rejects Plaintiffs suggestion that ICANN is required to obtain registrar consensus before it can enter into any agreement with a third party that might affect domain name allocation. If the Court adopted this interpretation, the registrars would effectively have the power to veto any contract that affected their economic interests.

The Court also rejects Plaintiffs' argument that ICANN breached Subsection 2.3 of the RAA. The plain language of Subsection 2.3 makes it clear that the obligations imposed on ICANN under that section do not apply to matters falling outside the RAA. Because the implementation of WLS does not affect a right or obligation of Plaintiffs under the RAA or otherwise require [*1166] an amendment to the RAA, its implementation falls outside the scope of the RAA. It is unlikely that Plaintiffs will be able to prove that the provisions of Subsection 2.3 are applicable and, therefore, that ICANN breached those provisions of the RAA. Accordingly, even if Plaintiffs could demonstrate the requisite showing of irreparable harm, they have failed to demonstrate either probable [**19] success on, or serious questions going to, the merits of their claims and, thus, their request for a preliminary injunction should be denied under any formulation of the standard for issuance of a preliminary injunction.

C. The Public Interest Does Not Favor Issuance of a Preliminary Injunction.

"In cases where the public interest is involved, the district court must also examine whether the public inter-

est favors the plaintiff." *Fund for Animals v. Lujan*, 962 F.2d 1391, 1400 (9th Cir. 1992) (citing *Caribbean Marine Services Co. v. Baldrige*, 844 F.2d 668, 674 (9th Cir. 1988) and *Northern Alaska Environmental Center v. Hodel*, 803 F.2d 466, 471 (9th Cir. 1986)). "The public interest inquiry primarily addresses impact on non-parties rather than parties." *Sammartano v. First Judicial Court, IN*, 303 F.3d 959, 974 (9th Cir. 2002). While the effect on the public interest was, at one time, part of the balance of hardships analysis, the Ninth Circuit has held that this factor "is better seen as an element that deserves separate attention in cases where the public interest may be affected." *Id.* at 974. In [**20] this case, the proposed preliminary injunction would interfere with the comprehensive scheme devised by the Department of Commerce to administer the Internet. *See, e.g., Bellin-grath-Morse Foundation v. Bellsouth Telecommunications, Inc.*, 884 F. Supp. 472, 478-79 (S.D. Ala. 1995) (against public interest to interfere with comprehensive system to redesign area code system used throughout United States). Such interference should not be undertaken lightly.

Moreover, as the parties agreed, the public's interest is affected in this case as consumers of Internet domain names. In the current secondary domain market, consumers have no guarantee of acquiring a soon-to-be-deleted registered domain name. Instead, consumers must pay a fee to one or more of the registrars who offer a wait-listing service for the right to compete with approximately fifty other individuals to register the same

domain name if that domain name is deleted. However, after WLS goes into effect, consumers will pay one fee to a registrar and they will be guaranteed that they will become the new registrant of the domain name if it is deleted. Additionally, because all registrars will be able to offer WLS, [**21] registrars will have to compete against each other in other ways - such as offering additional services, competitive pricing, and/or improved customer service - that will increase the options available to and the value received by consumers. It would appear that because all of the approximately 170 registrars would be able to offer WLS to consumers, as opposed to the approximately 50 that currently offer their own wait-listing services now, the options available to consumers of Internet domain names could greatly increase. Accordingly, it appears that the implementation of WLS has the potential to benefit registries, registrars who do not currently offer wait-listing services, and, most importantly, the public. Therefore, the Court finds that the public interest supports denying Plaintiffs request for a preliminary injunction.

[*1167] IV. Conclusion

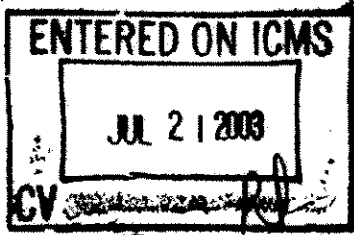
For all the foregoing reasons, Plaintiffs' Motion for Preliminary Injunction is DENIED.

IT IS SO ORDERED.

The Clerk shall serve a copy of this Minute Order on all parties to this action.

EXHIBIT C

TO DECLARATION OF SEAN W. JAQUEZ
IN SUPPORT OF ICANN'S OPPOSITION TO
PLAINTIFF'S *EX PARTE* APPLICATION
FOR TEMPORARY RESTRAINING ORDER



UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

PRIORITY SEND

CIVIL MINUTES -- GENERAL

Case No. **CV 03-5045-JFW (MANx)**

Date: July 18, 2003

Title: **DOTSTER, INC., etc., et al. -v- INTERNET CORPORATION FOR ASSIGNED NAMES AND NUMBERS, etc.**

DOCKET ENTRY

PRESENT:

HONORABLE JOHN F. WALTER, UNITED STATES DISTRICT JUDGE

**K. Leigh Ray
Courtroom Deputy**

**None Present
Court Reporter**

ATTORNEYS PRESENT FOR PLAINTIFFS:
None

ATTORNEYS PRESENT FOR DEFENDANTS:
None

PROCEEDINGS (IN CHAMBERS):

ORDER DENYING PLAINTIFFS' REQUEST FOR TEMPORARY RESTRAINING ORDER, REQUEST FOR ISSUANCE OF AN ORDER TO SHOW CAUSE RE PRELIMINARY INJUNCTION, AND REQUEST FOR EXPEDITED DISCOVERY

On July 16, 2003, Dotster, Inc., Go Daddy Software, Inc., and eNOM, Inc. (collectively "Plaintiffs") filed a complaint against Internet Corporation For Assigned Names And Numbers ("ICANN") alleging two claims for relief: (1) Declaratory judgment; and (2) Specific performance. On the same day, Plaintiffs filed a Motion For Temporary Restraining Order, Preliminary Injunction, And Expedited Discovery. On July 17, 2003, ICANN filed a Preliminary Opposition To Plaintiffs' Motion For Temporary Restraining Order, Preliminary Injunction, And Expedited Discovery. Pursuant to Rule 78 of the Federal Rules of Civil Procedure and Local Rule 7-15, the Court finds that this matter is appropriate for decision without oral argument. After considering the moving and opposing papers and the arguments therein, the Court rules as follows:

I. Standard

In the Ninth Circuit, "preliminary injunctive relief is available to a party who demonstrates either (1) a combination of probable success and the possibility of irreparable harm, or (2) that serious questions are raised and the balance of hardships tips in its favor." *Arcamuzi v. Continental Airlines, Inc.*, 819 F.2d 935, 937 (9th Cir. 1987). "Under any formulation of the test, the moving party must demonstrate a significant threat of irreparable injury." *Id.* "Speculative

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injury does not constitute irreparable injury sufficient to warrant granting a preliminary injunction." *Carribbean Marine Services Company, Inc. v. Baldrige*, 844 F.2d 668, 674 (9th Cir. 1988); see also *Church v. City of Huntsville*, 30 F.3d 1332, 1337 (11th Cir. 1994) (holding that "[b]ecause injunctions regulate future conduct, a party has standing to seek injunctive relief only if the party alleges, and ultimately proves, a real and immediate--as opposed to a merely conjectural or hypothetical--threat of future injury"). It is "well-settled law that [i]njunctions will not be issued merely to allay the fears and apprehensions or to soothe the anxieties of the parties." *Cambell Soup Co. v. Conagra, Inc.*, 977 F.2d 86, 92 (3d Cir. 1992) (citations and quotations omitted). Thus, courts will not grant preliminary injunctive relief where "[multiple contingencies must occur before [the plaintiff's] injuries ripen into concrete harms." *Carribbean Marine Services*, 844 F.2d at 674; see also *Skelly v. Dockweiler*, 75 F. Supp. 11, 17 (S.D.Cal. 1947) (denying a preliminary injunction because the alleged damage was "not immediate, but remote and flowing from contingencies which have not arisen and may never arise").

II. Discussion

In this case, Plaintiffs have failed to demonstrate a significant threat of irreparable injury. Plaintiffs argue that they will be irreparably injured when the Wait Listing Service ("WLS") proposed by Verisign, Inc. ("Verisign") is implemented. According to Plaintiffs' complaint, negotiations between ICANN and Verisign regarding the implementation of WLS are on ongoing. (Compl. ¶ 42.) The complaint also states that WLS will not be implemented until October 11, 2003, nearly three months from the date Plaintiffs filed their current motion. (*Id.*) Moreover, according to evidence submitted by Defendant, whether WLS will ever be implemented is dependent upon several contingencies: (1) Verisign would have to actually reach an agreement with ICANN; (2) the United States Department of Commerce would have to approve the agreement; and (3) Verisign would have to undertake the significant technical and operational tasks of implementing WLS. (Halloran Decl. ¶ 14.) Thus, assuming that Plaintiffs will actually be damaged from the implementation of WLS, such damage will not be immediate, but remote and flowing from contingencies which have not arisen and may never arise. Accordingly, the Plaintiffs have not demonstrated a significant threat of irreparable harm for purposes of obtaining a temporary restraining order.

III. Conclusion

For the foregoing reasons, the Court **DENIES** Plaintiffs' request for temporary restraining order, request for issuance of an order to show cause re preliminary injunction, and request for expedited discovery. If Plaintiffs wish to pursue their request for injunctive relief, they should proceed by way of noticed motion. Any issues regarding discovery shall be addressed by the magistrate judge assigned to this case.

IT IS SO ORDERED.

The Clerk shall serve a copy of this Minute Order on all parties to this action.

EXHIBIT D

TO DECLARATION OF SEAN W. JAQUEZ
IN SUPPORT OF ICANN'S OPPOSITION TO
PLAINTIFF'S *EX PARTE* APPLICATION
FOR TEMPORARY RESTRAINING ORDER

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CLERK, U.S. DISTRICT COURT
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UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

21 DOTSTER, INC., GO DADDY
22 SOFTWARE, INC., and eNOM,
23 INC.,

24 Plaintiffs,

25 v.

26 INTERNET CORPORATION FOR
27 ASSIGNED NAMES AND
28 NUMBERS,

Defendant.

Case No. CV03-5045 JFW (MANx)

STIPULATION AND PROPOSED
ORDER FOR DISMISSAL WITH
PREJUDICE

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Pursuant to Federal Rule of Civil Procedure 41(a), Plaintiffs Dotster, Inc., GoDaddy, Inc., and eNom, Inc. by and through their respective counsel of record hereby request dismissal of this matter with prejudice. Defendant Internet Corporation for Assigned Names and Numbers, by and through its counsel of record, hereby stipulates to Plaintiffs' request. Each of the undersigned parties agrees that it shall bear its own costs and attorney's fees associated with this matter.

IT IS SO STIPULATED.

Dated: December 21, 2003

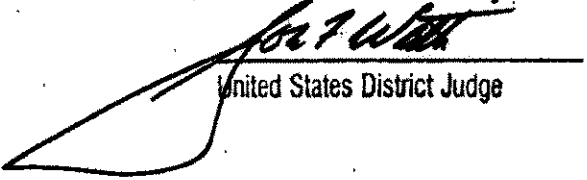
PRESTON GATES & ELLIS LLP

By: 

J. W. Ring
Attorneys for Plaintiffs DOTSTER, INC.
AND GODADDY, INC.

IT IS SO ORDERED

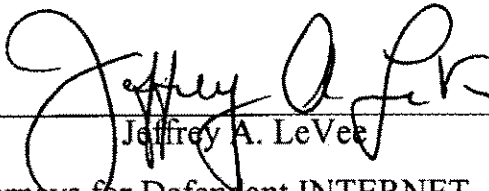
Dated December 4, 2003


United States District Judge

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Dated: December 02, 2003

JONES DAY

By: 

Jeffrey A. LeVee

Attorneys for Defendant INTERNET CORPORATION FOR ASSIGNED NAMES AND NUMBERS

SCANNED

1 Dated: December 2, 2003

PERKINS COIE LLP

By: 

Benjamin E. Soffer

Attorneys for Plaintiff eNOM, INC.

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IT IS SO ORDERED.

Dated: _____

UNITED STATES DISTRICT
COURT JUDGE

SCANNED

1 PROOF OF SERVICE

2 STATE OF CALIFORNIA, COUNTY OF LOS ANGELES:

3 I am employed in the County of Los Angeles, State of California. I am over
4 the age of 18 and not a party to the within action; my business address is 555 West
5 Fifth Street, Suite 4600, Los Angeles, California 90013.

6 On December 3, 2003, I caused to be served the document described as
7 **STIPULATION AND (PROPOSED) ORDER FOR DISMISSAL WITH**
8 **PREJUDICE** on the interested parties in this action.

9 X BY (U.S. MAIL) I placed ___ the original X a true copy thereof enclosed in
10 sealed envelope(s) to the addressee(s) as follows:

11 See attached Service List

12 ___ BY PERSONAL SERVICE I placed ___ the original ___ true copies thereof
13 enclosed in sealed envelope(s) and caused such envelope to be hand delivered via
14 messenger to the offices of the addressee(s) as follows:

15 I am "readily familiar" with the firm's practice of collection and processing
16 correspondence for mailing. Under that practice it would be deposited with the
17 U.S. postal service on that same day with postage thereon fully prepaid at Los
18 Angeles, California in the ordinary course of business. I am aware that on motion
19 of the party served, service is presumed invalid if postal cancellation date or
20 postage meter date is more than one day after date of deposit of mailing in affidavit.

21 ___ (STATE) I declare under penalty of perjury under the laws of the State of
22 California that the foregoing is true and correct.

23 X (FEDERAL) I declare that I am employed in the office of a member of the
24 bar of this Court at whose direction this service was made. I declare under penalty
25 of perjury under the laws of the United States of America that the foregoing is true
26 and correct.

27 Executed on December 3, 2003, at Los Angeles, California.

28 _____
Grace M. Salter
Type or Print Name

Grace M. Salter
Signature

SERVICE LIST

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EXHIBIT E

TO DECLARATION OF SEAN W. JAQUEZ
IN SUPPORT OF ICANN'S OPPOSITION TO
PLAINTIFF'S *EX PARTE* APPLICATION
FOR TEMPORARY RESTRAINING ORDER

Lextext

Bret Fausett's Internet Printing Press

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From Behind the Irony Curtain

by [Bret Fausett](#) at 08:01AM (PST) on November 23, 2005 | [Permanent Link](#) | [Cosmos](#)

A new group has popped up to lobby against the .COM Registry Agreement: the "[Coalition for ICANN Transparency](#)," or CFIT (pronounced "See Fit"). Calling itself "*a group of individuals, organizations and companies concerned about the lack of visibility into the activities and operations of the internet governing body,*" CFIT will surely inspire a CFIT-CFIT, or, the "Coalition for Increased Transparency on the Coalition for ICANN Transparency." Nowhere on the site does CFIT disclose who formed it, who is funding it, or who has joined the "coalition."

Whois reflects that [cfit.info](#), the organization's primary site, is registered to Jason Eberstein, of the DC lobbying firm of [Trammell and Company](#). The address for CFIT and Trammell and Company are the same.

I can understand why an organization or a group would want to lobby against the .COM Registry Agreement -- it's not a good deal. What I can't understand is why they would choose to make the lobbying effort about "transparency" while failing to disclose their own names. C'mon folks, it's warm out here in the sun.

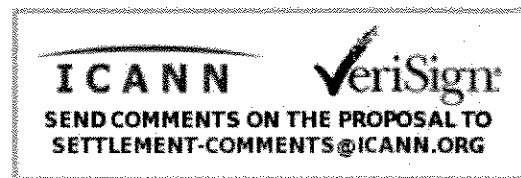
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COMMENTS

Re: From Behind the Irony Curtain

by [Alexander](#) at 12:38PM (PST) on Nov 23, 2005 | [Permanent Link](#)

CFIT media contact Marcie Hatch has done PR for GDNX and Pool.com.
CFIT comments section moderator John Berard has done PR for



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LOGIN

Username:

Pool.com.
GDNX and Pool.com both belong to the Momentous.ca Corporation.
The Domain's admin e-mail address is at momentous.ca.
You do the math. :-)

Reply

Password:

[Create Reader Account](#)

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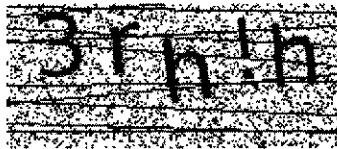
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EXHIBIT F

TO DECLARATION OF SEAN W. JAQUEZ
IN SUPPORT OF ICANN'S OPPOSITION TO
PLAINTIFF'S *EX PARTE* APPLICATION
FOR TEMPORARY RESTRAINING ORDER

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Datamonitor NewsWire

November 24, 2005

LENGTH: 599 words

HEADLINE: Group forms to challenge VeriSign on .com

HIGHLIGHT:

Momentous.ca Corp, a Canadian domain registration firm, has formed a lobby group in the US to challenge VeriSign Inc over proposals that would let it more easily introduce new services that would challenge Momentous's business.

BODY:

The new Coalition For ICANN Transparency, CFIT, has already scored an early success by persuading Representative Donald Manzullo, chairman of the Congressional Committee on Small Business, to publicly express concern.

VeriSign recently promised to settle its lawsuit against ICANN in exchange for a renewal of the contract that lets it run the .com domain. The proposed contract extends its term from 2007 to 2012, and lets it raise prices by 7% a year.

More concerning to Momentous are the parts of the contract that would enable VeriSign to more easily introduce new domain registry services, some of which could compete with Momentous's own services.

CFIT, launched under the guise of a body seeking more transparency in ICANN's processes, says that the proposed .com contract, which was negotiated in private, "reinforces four forces detrimental to the internet".

These are: "A lack of transparency; A continued erosion of checks-and-balances; Imposition of unilateral price increases that run counter to market logic; Unchecked expansion of the .com registry's natural monopoly into competitive areas."

The organization managed to persuade Manzullo, a Republican from Illinois, to write to Michael Gallagher, assistant secretary at the US Department of Commerce, which oversees ICANN, to express concern over "reducing competition".

"If this settlement is allowed to go forward, hundreds of other much smaller companies performing the role of domain registrars will see their markets diminished because ICANN has given VeriSign permission to expand its dominant market position into what are now competitive markets," he wrote.

While much of the public opposition to the .com deal is over the potential for pricing increases which could, if VeriSign exploits them fully, see the price of a .com double between 2007 and 2012.

CFIT spokesperson John Berard, of the Zeno Group, Momentous's PR agency, said it is estimated that if the price increases are fully implemented and the .com namespace grows at its current rate, it would add \$1.5bn to the cost of doing business online.

But Momentous is more concerned with the provisions of the deal that would enable VeriSign to more quickly and easily launch new registry-level services that could in theory result in the company monopolizing certain markets.

Berard said that VeriSign would be able to introduce new registry services that would allow it to capture the secondary market for domain name sales -- such as auctions of valuable names and expiring name registrations.

VeriSign attempted to introduce such a service, the Waiting List Service, a few years ago, which prompted Pool.com, one of Momentous's subsidiaries, to sue ICANN to prevent WLS being launched.

Secondary market players fear that, because VeriSign controls the registry, it will be able to introduce competitive services at the wholesale level, essentially killing certain retail-level business models. Critics said WLS would do precisely that.

Currently, CFIT has no members other than Momentous, but it plans to recruit at ICANN's annual meeting in Vancouver. Berard said the organization already has broad support in principle, if not in writing.

The organization has also managed to secure Platinum-level sponsorship for ICANN's Vancouver meeting, despite ICANN's position of reserving the right to reject sponsorship cash if the sponsor's views conflict with ICANN policies.

CFIT's application for sponsorship, if not CFIT itself, was endorsed by Go Daddy Software Inc and Network Solutions Inc, the two largest registrars, which made it difficult for ICANN to ignore, Berard said.

LOAD-DATE: November 27, 2005